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Supreme Court, U.S.
FILED
101131 MAR 10 2011
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NO. _____

In The Supreme Court of the United States

MICHAEL DUANE SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining an Ineffective Assistance of Counsel claim ("IAC"), this Court has always looked to prevailing professional norms when reviewing the reasonableness of counsels' actions or omissions. The district court here based its order on the reasonableness of counsel's failure to file a meritorious speedy trial motion to dismiss NOT ON prevailing professional norms, but on the court's own view of the law and its self-serving view of those "norms." In other words, the court concluded that since "neither defendant's seasoned co-counsel ... or, indeed, this court, perceived a speedy trial issue," counsel's unawareness of relevant law and failure to file a meritorious motion was perfectly reasonable. The court of appeals countenanced this novel approach to determining IAC claims by denying Petitioner a certificate of appealability.

QUESTION: Whether the court of appeals erred in denying a certificate of appealability on an ineffective assistance of counsel claim that was decided by a novel standard directly conflicting with relevant Supreme Court precedent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mike Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, filed on October 15, 2010 and can be found at "App.1-8"; it is also found at USDC Docket Entry No. 1851. The District court ORDER denying Mr. Smith's section 2255 motion was filed on May 26, 2010 including the incorporated denial of a Certificate of Appealability; it is unreported and can be found at "App. 9-27"; it is also found at USDC Docket Entry 1818. The Affidavit of Mr. O'Donnell, entered as evidence in the 2255 Evidentiary Hearing can be found at "App. 28-33"; it is also found at USDC Docket Entry 1772.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 2010. This Court granted an extension to March 14, 2011. The District court had jurisdiction under 28 U.S.C. § 2255, and the Court of Appeals had jurisdiction to review the district court decision under

28 U.S.C. § 1291 and 28 U.S.C. § 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence."

Title 18 United State Code Section 3161(h)(7)(A) provides that excludable delay is authorized from:

> "Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best

> interests of the public and the defendant in a speedy trial."

Additionally, Title 18 United State Code Section 3161(h)(7)(H) provides for excludable delay which is:

> "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court."

STATEMENT OF THE CASE

This case involves the proper standard to be employed when courts are reviewing the objective reasonableness of counsel on an Ineffective Assistance of Counsel claim ("IAC").

The trial court believed, and the Court of Appeals inexplicably agreed, that the prevailing level of expertise was so low with regards to knowledge of the Speedy Trial Act ("STA") that no single attorney could fall below that "standard." This is not the "objectively reasonable" standard which this Court set forth as law in the Strickland case [1]; in fact and in deed, it is no standard at all, merely an excuse to continue to

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[1] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

confine Mr. Smith, in contravention of his right to effective counsel.

Under the well known Strickland case there is a two prong test for determining IAC. In this matter the second prong, prejudice, was fully satisfied by virtue of the denial of a substantial federal right (the right to not be tried had a motion to dismiss for violation of the STA been timely submitted and successfully briefed and argued). The first prong, sub-standard performance, that a reasonably competent attorney would have known that the STA had been violated; however, in Mr. Smith's case no such demonstration of knowledge was made, despite a law (the speedy trial act) which had been on the books (and well presented in every single circuit) for over 30 years and literally hundreds of cases from District courts, Courts of Appeals, and this, the United States Supreme Court.

For these reasons, the Court should grant the writ.

1. **Chronology of Relevant Events**

On March 10, 2004, an indictment was returned against Smith and six others charging them with multiple counts of conspiracy and securities fraud. Smith made his initial appearance on March 12, 2004, and posted bond on March 31, 2004 (his release on bond continued until his voluntarily surrender to the Bureau of Prisons on July 28, 2008). He was arraigned April 12, 2004, and pled not guilty. A joint jury trial

began April 2, 2007, and concluded on May 29, 2007. The jury found Smith guilty on three of the seventeen counts alleged against him.

The speedy trial clock did not start running until April 12, 2004 when the last defendant was arraigned. 18 U.S.C. § 3161(c)(1).

Co-defendant Janice McLain filed a motion styled "UNOPPOSED MOTION FOR DECLARATION OF COMPLEXITY", [USDC Docket Entry No. 54] [2] on April 2, 2004.

Mr. Smith filed an objection and proposed a 90 day continuance [USDC Docket Entry No. 91], he was the only defendant to oppose the delay. The motion was heard with oral argument. The court overruled Mr. Smith's objection and granted the motion for complexity on April 30, 2004 [USDC Docket Entry No. 95].

A. Time-line Showing Speedy Trial Act Violation

The below table is NOT intended to be an exhaustive "reticulated concatenation"[3] of every motion

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[2] "USDC Docket Entry No." is used throughout this Petition to signify the docket numbers in the U.S. District court, the trial court.

[3] App. at 15.

and every exclusion of time, automatic or otherwise. It will, however, clearly show what is intuitively obvious, that during the approximately 1084 days from arraignment on April 12, 2004 (of the last defendant to be arraigned) and the start of trial on April 2, 2007, there was VERY LIKELY more than 70 non-excludable days of delay.

TABLE of Computation of Excluded Days Starting 7/25/06 and Continuing until 1/16/07

Day #	Dkt. #	Date Filed	Date Ruled	Days Excluded
1	804	7/25/06	7/25/06	0
2 - 31		7/26/2006 - 8/24/2006		
		No excludable activity		0
32	818	8/25/2006	8/25/2006	0
33	819	8/26/2006	8/26/2006	0
34 - 36	8/27/06 - 8/30/06			
		No excludable activity		0
37	829	8/31/06	9/01/06	1
38 - 85		9/02/06 - 10/17/06		
		No Excludable activity		0
86	874	10/18/06	10/20/06	2
87 - 98	10/19/06 - 10/30/06			
		No Excludable Activity		0
99	886	10/31/06	11/2/06	2
100 - 170		11/03/06 - 1/10/07		
		No Excludable Activity		0
171	968	1/11/07	1/16/07	5

SUMMARY

Total Days Elapsed from 7/25/06 to 1/16/07 = 175
Days Excluded per 18 US § 3161 = 10 days
Non-Excludable Days 165

2. **Stipulation of Exclusion of Time**

For the purposes of Mr. Smith's 28 U.S.C. § 2255 motion, it was assumed, *arguendo*, that all the time between April 30, 2004 and July 25, 2006 had been properly excluded for purposes of determining a Speedy Trial Act violation.

3. **Order of Complexity Unreasonably Excluded Time**

The trial court's order of complexity in this matter created an open-ended continuance, as admitted by the trial court, App. at 16, and as specifically denied by this Court, Zedner v. U.S., 547 U.S. 489, 508-509 (2006), and by rulings by the Tenth Circuit for example U.S. v. Spring, 80 F.3d 1450 (C.A.10 (Utah), 1996) holding that open-ended continuances were ONLY allowable if the delay was REASONABLE.[4] Also see U.S. v. Barnes, 159 F.3d 4 (C.A.1 (Mass.), 1998), open-ended continuances are not per se impermissible in this Circuit; Accord U.S. v. Jones, 56 F.3d 581, 585-586 (C.A.5 (Tex.), 1995) open-endedness not permitted even with findings from court as to the necessity of a continuance; also see USA. v. Hill, 197 F.3d 436, 443 (10th Cir., 1999), open-ended continuances allowable ONLY for "reasonable" periods. "COMPLEXITY" rulings do not, *per se*, allow for open-

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[4] In this matter approximately 1077 days elapsed from the date of the "complexity" order to the start of trial – such delay is NOT reasonable.

ended continuances as each continuance must be bounded by time and the record must reflect the balancing the court did to reach an "ends-of-justice" delay. U.S. v. Theron, 782 F.2d 1510 (C.A.10 (Kan.), 1986) ruling that:

> "[a]lthough Congress recognized that an ends-of-justice exclusion often would be appropriate in trials of complex criminal conspiracies, it noted that " '[e]ach time such a continuance is granted in a complicated case the judge will still have to weigh the right of society and the defendant to a speedy trial against the 'ends of justice.' " *United States v. Carrasquillo*, 667 F.2d 382, 387 (3rd Cir.1981) (quoting S.Rep. No. 93-1021). Thus the complexity of a case does not automatically justify an ends-of-justice continuance."
>
> [...]
>
> "In holding that complexity plus multiple defendants are not enough, by themselves, we are influenced by Congress' express intent that the ends-of-justice exception be used rarely and only in narrow circumstances." – U.S. v. Theron at 1513.

At no time subsequent to the April 30, 2004 continuance, did the court enter any findings or reasons as to why a particular continuance was necessary under the "ends-of-justice" rationale, or state any other conditions of excludability under the STA.

4. Defendant Denied Advice of Counsel

Mr. Smith was denied the advice of counsel through counsels' own self-admitted ignorance and in contravention of the Colorado Rules of Professional Conduct ("RPC") which require counsel to advise their clients on matters directly affecting their defense posture. RPC Rule 1.0(j); Rule 1.4; Rule 1.0(e); Rule 2.1. Padilla v. Kentucky, 130 S. Ct. 1473, 176 L. Ed.2d 284, 22 Fla. L. Weekly Fed. S 211 (2010) where failure to counsel the defendant regarding the applicable law and the rights accruing thereunder was grounds for a finding of Ineffective Assistance. Baker v. Kaiser, 929 F.2d 1495 (C.A.10 (Okl.), 1991); Lozada v. Deeds, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991); Romero v. Tansy, 46 F.3d 1024 (C.A.10 (N.M.), 1995).

5. Not a Single Attorney in the District was Competent

The trial court concluded that there were no attorneys in the entire District of Colorado who knew enough about the Speedy Trial Act to have recognized the violation which occurred. As a result, the court reasoned that under the "prevailing norm standard" of performance, Mr. Smith's attorneys could not have been less knowledgeable than others, and therefore were not guilty of being ineffective. The Tenth Circuit panel went along with this odd rationale and upheld the trial court's ruling.

While the "prevailing norm standard" is not inappropriate *per se,* what is inappropriate is the clearly erroneous assertion that there were no attorneys in the District who knew enough about the STA to apply it in Mr. Smith's case. Both the trial court and the court of appeals claimed that strict compliance with the STA was only known AFTER the Tenth Circuit ruled in U.S. v. Toombs, 574 F.3d 1262 (10th Cir., 2009). App. at 5, 16. The "reasoning" goes that since the Toombs and Williams [5] cases didn't come out until after Mr. Smith's case went to trial, that no one could have known the "level of detail" required to comply with the law.

Such a view ignores the fact that even the trial court admitted that Toombs and Williams did not make any new law, App. at 10, and it ignores the many motions filed and appeals taken regarding STA violations in the years leading up to the start of Mr. Smith's trial. Reasonable jurists have disagreed with the holding in this matter, time and again, and the standard for issuance of a COA was not followed.

The denial of Mr. Smith's application for a COA is clearly in error.

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[5] United States v. Williams, 511 F.3d 1044 (10th Cir. 2007). App. at 16.

REASONS FOR GRANTING THE PETITION

There are two aspects to this matter which the Court should consider: First is the trial court's inexplicable reasoning viz the denial of Mr. Smith's 28 U.S.C. § 2255 motion. Second is the Tenth Circuit court's equally inexplicable denial of a Certificate of Appealability ("COA"). These are dealt with below, to the extent possible, chronologically.

1. Ineffective Assistance of Counsel

Mr. Smith's trial attorneys were constitutionally ineffective by failing to file a motion to dismiss the indictment and for failing to advise him about his right to seek dismissal before he the start of trial.

As a direct result, Mr. Smith was prejudiced because he was deprived of his statutory right to a mandatory order of dismissal. The reason his attorneys did not file a motion to dismiss or consult with him about his right to seek dismissal was <u>not</u> because they exercised sound judgment and ultimately decided against it. Rather, it can be attributed to neglect because they had paid no attention to the STA or to any of its requirements or deadlines.

Counsels' deficient performance is entirely attributable to a failure to act rather than to a conscious, deliberate decision to not act after having weighed the pros and cons of the matter. Such performance is considered insufficient when counsel

omits a "significant and obvious issue" without a "legitimate strategic reason for doing so." The Seventh Circuit opinion in Mason v. Hanks, 97 F.3d 887 (7th Cir. 1996), demonstrates the method by which they apply the Strickland test to a claim that counsel failed to raise the correct issues on appeal.

> "We deem performance insufficient when counsel omits a 'significant and obvious issue' without a legitimate strategic reason for doing so. Mason, at 893, quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986), and Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993). We find prejudice when that omitted issue 'may have resulted in a reversal of the conviction, or an order for a new trial.' Mason, at 893, quoting Gray, 800 F.2d at 646." – Howard v. Gramley, 225 F.3d 784 (7th Cir., 2000).

> "[W]hen, through ignorance or oversight, [counsel] fails to exercise [judgment]...in dereliction of the duty to represent her client...is what we mean by attorney error. – [5] Carrier v. Hutto, 724 F. 2d 396 at 401 (4th Cir. 1983). In such cases "the defendant should not be penalized...for a momentary lapse by counsel." *Id.*

In Carrier, the defendant alleged ineffectiveness which had resulted in a procedural default. The Fourth Circuit made a dispositive distinction between procedural defaults resulting from deliberate tactical decisions and those resulting from ignorance or

inadvertence. It found that the later category, i.e. ignorance or inadvertence, constitutes "cause," i.e. deficient performance. That's because "a tactical decision implies that counsel had at worst "reasonably but incorrectly exercise[d] her judgment," [while] ignorance or oversight implies that counsel "fail[ed] to exercise it at all, in dereliction of the duty to represent her client." *Id.*

Similarly, the Ninth Circuit found "cause" where an attorney failed to object or appeal due to "inadvertence or ignorance."

The rationale used in Carrier, Garrison[6], Mason, Gray v. Greer, Hollenback, and Howard v. Gramley is certainly directly applicable here. Counsel failed to exercise any judgment, reasonable or not.

A defendant has every right:

> "[t]o expect his attorney will use every skill, expend every energy, and tap every legitimate resource in exercise of independent professional judgment on behalf of defendant and in undertaking representation." – Frazer v. United States, 18 F.3d 778, 779 (9th Cir. 1994).

As here, when "an attorney fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the omission, his

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[6] See Garrison v. McCarthy, 653 F.2d 374 (9th Cir.1981).

performance falls below the standard of proficient representation that the Constitution demands." U.S. v. Flowers, 464 F.3d 1127 at 1131(10th Cir., 2006); Cf. United States v. De la Fuente, 8 F.3d 1333, 1337 (9th Cir.1993); Prou v. U.S.A., 199 F.3d 37 (1st Cir., 1999).

In light of all the circumstances, "the identified ... omissions were outside the wide range of professionally competent assistance" under Strickland. – Strickland, at 690.

2. **The Strickland Standard**

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense. Yarborough v. Gentry, 540 U.S. 1 at 5 (2003).

To prevail on a claim of ineffectiveness, a defendant must satisfy the two-prong test established in Strickland. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, he must show that his attorney's ineffective performance prejudiced him.

> "[C]counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." – Strickland at 690.

"Reasonableness" must be evaluated from counsel's perspective in light of all the circumstances extant at the time of the alleged deficiency. "The defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' See Michel v. Louisiana, supra, 350 U.S., at 101, 76 S.Ct., at 164." – Strickland at 689.

> "Given the apparent absence from the record of indicia of tactical reflection by counsel on this issue, this failure would appear to fall outside the presumption that counsel's decisions might be considered 'sound trial strategy' under Strickland. at 689, quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955). Although '[t]he Constitution does not insure that defense counsel will recognize and raise every conceivable constitutional claim', [citations omitted] STA considerations were prominent enough in the pre-trial period to commend counsel's consideration of a Section 3162(a)(1) dismissal. [citation omitted] Because counsel's failure to move for a dismissal was prejudicial and was not a matter of trial tactics falling within her wide discretion under Strickland's first prong, Palomba's third contention of error raises a colorable claim of ineffective assistance." – U.S. v. Palomba, 31 F.3d 1456, 1466 (C.A.9 (Cal.), 1994).

If Mr. Smith's counsel had been properly or competently informed of the law regarding the STA

and had filed a proper motion to dismiss, it could have been effectively briefed and argued and Mr. Smith would not have been deprived of his guaranteed right to effective counsel. See U.S. v. Palomba, supra, as quoted from above.

When "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." – Strickland at 669. A substantive AND procedural right denied Mr. Smith was the right to not have been held to trial, subsequent conviction and incarceration.

In this matter, the district court denied Petitioner's § 2255 motion. For grounds to deny, the court determined that even if a STA violation existed, counsel's failure to recognize the violation and file a motion to dismiss was reasonable professional conduct. The court based that decision not on the relevant law at the time of the STA violation, but on the fact that neither the court nor counsel was aware of the STA violation, App. at 17.

The trial court also stated that in the District of Colorado there were no reasonably competent attorneys in the entire District of Colorado who could have recognized an STA violation in 2005-2007. [7]

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[7] The exact words in the opinion are: "***See Toombs***, 574 F.3d at 1278-79 (Tymkovich, J., dissenting) (finding that district court's findings were adequate under existing Tenth Circuit precedents). (continued...)

3. Ineffective Performance under Strickland

The Strickland prong of performance is clearly met by Mr. Smith. "Cause for non-compliance and ineffective assistance of counsel are patently intertwined." – Runnels v. Hess, 653 F.2d 1359, 1364 (C.A.10 (Okl.), 1981). An ineffective assistance claim based on counsel's failure to assert a speedy trial claim may form the basis for habeas relief, just as here. Nelson v. Hargett, 989 F.2d 847, 850 (C.A.5 (Miss.), 1993);

> " ... we do believe Smith stated a facially valid claim of ineffective assistance of counsel based upon his counsel's failure to move for dismissal of the charges against him." – Smith v. U.S., 881 F.2d 1077 (C.A.6 (Mich.), 1989).

This Court has held that: "Unfairness or unreliability does not result unless counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him". Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Note that the cases cited above (Runnels, Nelson, Smith, & Lockhart) also pre-date Mr. Smith's case by

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[7] (...continued)
More to the point, the evidence presented at the hearing affirms that such was not the understanding or practice of competent criminal defense attorneys in this district, either."

many years: MR. SMITH'S COUNSEL WAS DEFICIENT.

4. Was There a Speedy Trial Act Violation?

In the table shown above, only those docket entries which might have affected the speedy trial clock are shown. All the other docket activity is irrelevant as to the speedy trial clock computations.

A. Large Periods of Time were not Excludable

As the table above reveals, there were large blocks of time when nothing (relevant to speedy trial clock computations) was happening – weeks and even months passed without any excludable activity – there were times when pending motions had long run out their 30-day exclusion period, 18 U.S.C. § 3161(h)(1)(H). *Ergo* there were large periods of time during which no competent or automatic exclusion of time tolled the speedy trial clock. Mr. Stuckey and Mr. O'Donnell were plainly negligent by failing to recognize this and then filing the appropriate motion to dismiss.

B. At Least 165 Non-excludable Days Accumulated in Just One Six Month Period

Assuming, *arguendo,* that every day to and including July 24, 2006 had been properly excluded, at

least one-hundred sixty-five (165) non-excludable days elapsed afterward. The docket shows that, by July 25, 2006, there were no outstanding motions awaiting rulings which could have excluded time (taking into account the 30-day exclusion period from the date of filing a motion until it is deemed to be under advisement by the court). Between July 25, 2006 and January 16, 2007, just seven (7) motions were filed which cumulatively excluded only 10 days.

By October 4, 2006 (from July 25, 2006 until and including October 3, 2006 is 70 days) if not before, the Speedy Trial Act was violated because Mr. Smith had not been brought to trial within seventy (70) "non-excludable" days as required under the Act. It is quite likely that there were many more non-excludable days during the one-thousand and eighty-four (1084) calendar days that elapsed between April 12, 2004 and April 2, 2007. But for purposes of determining whether the seventy (70) day trial clock had been violated, it is unnecessary to examine the docket any further (a docket that now exceeds 170 pages).

C. **Trial Court Confesses STA violation**

The trial court admitted that a STA violation had occurred. It did this in two ways, the first was indirect, i.e., it received Mr. Smith's section 2255 motion and determined an Evidentiary Hearing was necessary. The focus of that order was clearly whether there was demonstrable reasons for the lack of action by defense counsel. The trial court, in ordering the

evidentiary hearing stated:

> "I am particularly interested in receiving evidence and testimony regarding whether encouraging or acceding to the delay in bringing this matter to trial was a tactical decision or strategic consideration in counsels' representation of defendant." – USDC Docket Entry No. 1781 at 2.

Had the court determined that no STA violation had occurred, it would have been required by law to deny Mr. Smith's motion right then and there.[8] The second way was direct and explicit. The trial court simply and candidly agreed with Mr. Smith's contention regarding a violation of the STA when it issued its Order denying the motion. What it said was:

> "... it appears likely that my open-ended Order Granting Defendant's Motion for Declaration of Complexity [#95], filed April 30, 2004, was not sufficient *per se* to have warranted a nearly three-year continuance of the trial and that the significant lapse of time between the filing and resolution of many of the numerous motions submitted in this case was not entirely excludable

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[8] At USDC Docket Entry No. 1773, the trial court stated:
> * * * "Based on my initial consideration of defendants motion, which includes my consideration of the motion and the record of prior proceedings, I can not conclude summarily that the defendant is not entitled to relief and that the motion should be dismissed." – ORDER setting the Evidentiary Hearing

either." – App. at 17.

5. **The Trial Court's New and Novel Standard**

A. **The "Standard" was based on an imagined Level of Expertise**

Following the evidentiary hearing the District court decided that even if there was a Speedy Trial Act violation, and even if counsel failed to file a meritorious Speedy Trial motion to dismiss, counsel's performance was still reasonable under Strickland because: 1) counsel for co-defendants also missed the STA claim; 2) the district court did not recognize it had violated the STA; and 3) that no attorneys competent to practice law and recognize a STA violation are found in the District of Colorado.

B. **This "Standard" Is a Dangerous Precedent**

As noted above, one matter to be considered by this Court, is the rather strange, even novel, explanation as to why Mr. Smith had not received less than objectively reasonable assistance of counsel.

The trial court believed, and the Court of Appeals inexplicably agreed, that the prevailing level of expertise was so low with regards to knowledge of the Speedy Trial Act that neither of Mr. Smith's attorneys could fall below that "standard."

What the trial court articulated in its order is not

the "objectively reasonable" standard which this Court set forth as law in Strickland; in fact and in deed, it is no standard at all, merely an excuse to continue to confine Mr. Smith, in contravention of his right to effective counsel.

Such a "standard" for determining the objective reasonableness of counsel's actions and omissions is contrary to this Court's precedent, makes little or no practical sense, and it would absolve attorneys from their duty to know the relevant law and apply their professional knowledge to their client's case.

By allowing the bald assertion that it "... was not the understanding or practice of competent criminal defense attorneys in this district" [9] to recognize a Speedy Trial Act violation, the lower courts have set a very dangerous precedent which could allow the entire purpose of the Speedy Trial Act to be severely undercut if not entirely eviscerated.

C. Strict Compliance WAS WELL KNOWN in 2006

Worse than being no real standard at all and contrary to the trial court's attempt to excuse incompetence by claiming that no attorneys in the district were competent to recognize a plain STA violation, the bald assertion that no one knew of the strict compliance requirements of the Act is simply not

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[9] App. at 17.

true. The requirements were both quite well known and well practiced. The trial court wanted to believe that strict compliance with the requirements of the STA was not known or knowable at the time of Mr. Smith's case before trial. App. at 17-18.

Such a belief fails the basic test of rationality since every Circuit Court of Appeals, including the Tenth Circuit had ruled many times on the STA prior to the start of Mr. Smith's trial in April 2007, and had set forth how strict compliance with the act was to be both generally and specifically achieved. [10] It also fails the test of factual accuracy, as will be fully detailed below.

The District court for support of its novel theory, presumably due to lack of authority elsewhere, cited the dissenting opinion in Toombs, supra.[11] But the thoroughly rebuffed dissenting view in Toombs [12] is not the prevailing view of the Tenth Circuit, or other

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[10] Even the trial court acknowledged that more recent cases, such as Toombs did not create any new law. – App. at 17.

[11] The district court stated: "Nevertheless, and although Williams [United States v. Williams, 511 F.3d 1044 (10th Cir. 2007)] and Toombs did not purport to radically change the law of speedy trial, ... it certainly was not this court's understanding of the apposite law that compliance with the Speedy Trial Act demanded the level of detail found essential under Toombs." citing the dissent in Toombs – App. at 17.

[12] The majority opinion addressing the dissent repeatedly and thoroughly with cogent explanations, showed why the dissent opinion was inapposite.

circuits, nor of this Court.

Also contrary to the District court's belief, the "level of detail" [13] regarding compliance with the STA is definitely not material with regards to whether Mr. Smith's trial court allowed a serious STA violation to occur. The undisputed fact is that no findings of fact, or fact based reasoning, were entered on the record for any of the few continuances [14] beyond even the longest possible reach of the April 30, 2004 order. LONG BEFORE THE TOOMBS case, the law was well established at the time of the violations in Mr. Smith's case that open-ended continuances were not allowed, and that continuances granted without contemporaneously entered facts explaining the reasoning of the court, were not continuances which could exclude time.

This Court ruled in 2006 in the Zedner [15] case that: "We thus conclude that when a district court makes no findings on the record in support of a § 3161(h)(8) continuance, harmless-error review is not appropriate." Zedner at 509. This conclusion was drawn specifically regarding orders of trial courts

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[13] App. at 17.

[14] Continuance orders which, though few in number, contrived to extend the trial approximately two and a half years beyond the reach of the first order of April 30, 2004.

[15] Zedner v. U.S., 126 S.Ct. 1976, 164 L.Ed.2d 749, 547 U.S. 489 (2006)

which had the effect of creating substantial open-endedness to the "ends-of-justice" requirements of the act. This is precisely what Mr. Smith's court did and then refused to correct when it was brought to its attention.

6. Mr. Smith's Counsel Rationalized Not Pursuing a Motion to Dismiss Because Other Attorneys in the Same Case Didn't File Either

The trial court relied on the erroneous belief which Mr. Stuckey holds,[16] namely that since other attorneys involved in the case, other than those representing Mr. Smith, did not file a motion to dismiss, that no motion to dismiss was warranted and therefore Mr. Smith's attorneys were not ineffective. However, the record is completely silent as to WHY those attorneys did not file such a motion. Each defendant and his attorney(s) might have had any number of reasons for not wishing to proceed speedily to trial. HOWEVER, speculation is not only not warranted, it actually is not allowed as a tool to evaluate this issue, and so the final relevant fact is that Mr. Smith was the ONLY defendant to oppose the first motion to continue. Subsequently, whenever Mr. Smith raised the question with his counsel as to proceeding speedily to trial, the mantra,

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[16] I also knew that other competent counsel, the five or six in the case, would have jumped all over it if in fact there had been an issue. – TESTIMONY OF STUCKEY: TRANSCRIPT OF EVIDENTIARY HEARING at 13.

once again, was that the judge's ruling (referring to the complexity ruling [USDC Docket Entry No. 95]) had forever waived Smith's right to a speedy trial.

So, regardless of why no motion was filed by other attorneys in this case, the salient fact is that nothing was filed on behalf of Mr. Smith because neither Mr. Stuckey nor Mr. O'Donnell cared enough to know the law so as to competently inform themselves AND Mr. Smith, about the straight-forward possibility of successfully securing a dismissal of the indictment.

Speculation by the trial court about whether the government might have attempted to reindict Mr. Smith is also misplaced and irrelevant. App. fn 10 at 25-26. Since they were not put to the test no one can at this late date know.

7. **The Genesis of Mr. Smith's 28 U.S.C. § 2255 Motion:**

Only after his trial did Mr. Smith learn of the Speedy Trial Act and it's potential application to his circumstances. He learned that his counsels' failure to file a motion to dismiss for violation of the STA, effectively waived his right to the substantial federal right of a dismissal of the indictment. Therefore, Petitioner filed a motion to vacate under 28 U.S.C. § 2255, alleging that his trial attorneys were ineffective by failing to file a STA motion to dismiss. The district court granted an evidentiary hearing in which attorneys O'Donnell and Stuckey testified on

January 21, 2010.

Mr. Smith believes that the first order of continuance (the "complexity" order referenced above at USDC Docket Entry No. 95) issued by the trial court was merely a declaration that the case was complex, as that was the relief the motion had requested the court grant [USDC Docket Entry No. 54] and that it actually never did properly exclude time. There is substantial case law supporting this contention; however, it is not necessary to delve too deeply into this possible failure for the fact is that other continuances were sought and granted subsequently ALL without proper or sufficient findings or investigation by the court, apparently because the court believed, just like Mr. Stuckey, that once a "complexity" order had been issued, there was nothing more which needed be done to comply with the Speedy Trial Act and that Mr. Smith's right to a speedy trial had been waived once and for all. This belief is manifest in Mr. Stuckey's testimony and the District court's reliance on it for grounds to deny Mr. Smith's Section 2255 motion.

After learning of Zedner v. U.S., Mr. Smith became of the opinion that the trial court's complexity order was nothing more than a *sub silentio* opened-ended continuance (as admitted by the trial court itself): something Zedner and many other cases have specifically stated was not allowed under the strict

requirements of the STA.[17] "The strategy of § 3161(h)(8) [what constitutes allowable excludable time], then, is "to counteract substantive open-endedness with procedural strictness." Zedner at 509; United States v. Jones, 56 F.3d 581, 586 n.10 (5th Cir. 1995); U.S. v. Barnes, 159 F.3d 4 (C.A.1 (Mass.), 1998); U.S. v. Spring, 80 F.3d 1450 (C.A.10 (Utah), 1996); United States v. Jordan, 915 F.2d 563, 565-66 (9th Cir.1990).

8. Evidence and Testimony in the Evidentiary Hearing

The Affidavit of Declan O'Donnell, entered as evidence in the evidentiary hearing, and the testimony given, makes it clear that Mr. Smith's attorneys knew so little about the Speedy Trial Act or the law at the time (April 2004 until the start of trial in April 2007) that they were unable to intelligently or competently inform Mr. Smith of a STA violation and the ramifications thereof. As this Court has recently ruled in Padilla v. Kentucky., 130 S. Ct. 1473, 176 L. Ed.2d 284, 22 Fla. L. Weekly Fed. S 211 (2010): failure to meet the professional standards such as the ABA's or the Professional Rules of Conduct for the Colorado

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[17] Though Zedner is about the ineffectiveness of a defendant's waiver, by itself to exclude time, this Court in Zedner clarified several other issues regarding the correct interpretation of the STA – open-endedness, being one of those issues – and therefore cannot be ignored in this instant matter, as the trial court attempted to do. App. fn 4 at 16.

State Bar[18] (RPC) is grounds for finding IAC under the Strickland view of ineffectiveness. Mr. Smith's section 2255 motion, submitted under the penalty of perjury, attests to the fact that he was never informed by counsel as to the STA. The testimony taken at the evidentiary hearing confirms this fact in all respects.

Mr. O'Donnell's Affidavit plainly and pointedly admits his ineffectiveness AND his sub-standard reliance on co-counsel Stuckey's erroneous twenty-plus-year-old opinion about complex cases forever tolling the speedy trial clock.[19] Affidavit of O'Donnell, App. ¶10 at 30. [USDC Docket Entry 1772]. At least Mr. O'Donnell was candid. Mr. Stuckey, however, tried to spin his testimony such that the District court could agree that the court itself did not know of a STA violation, as if this excused either of them. Then, appallingly, the trial court went further regarding that shocking lack of knowledge, and condoned it on the specious grounds that no one else understood the STA either.

For example: The trial court characterized Mr. Stuckey's testimony this way:

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[18] See Colorado Rules of Professional Conduct RPC Rule 2.1; RPC Rule 1.0(j); RPC Rule 1.4; RPC Rule 1.0(e).

[19] "Furthermore, Mr. Stuckey was Mr. O'Donnell's attorney during the 1980s and during his trial before Judge Matsch on tax shelter issues. Mr. Stuckey's limited experience then and now is based on the simple mantra, however erroneous, that 'speedy trial does not apply in complex cases.' " – App. ¶10 at 30.

> "Stuckey's credible testimony demonstrates that the prevailing view of competent attorneys at the time was that the combined effect of my April 30, 2005, ends-of-justice order and the numerous pending pretrial motions effectively obviated any speedy trial concerns." – App 2 at 25.

However, the fact remains that there was a STA violation and that Mr. Stuckey, stuck in a groove from the 1980s regarding "complexity" orders "obviating" any further STA considerations, didn't know the law, App. at 25 and App. ¶10 at 30. To highlight the deficiencies or ineffectiveness of counsel, what Mr. Stuckey testified to during direct examination by Mr. Smith is quite revealing, as the following excerpt from the transcript of the evidentiary hearing demonstrates:

> Q Are you familiar with the Supreme Court ruling of Zedner about the Speedy Trial case?
>
> A What's the --
>
> Q Zedner, Supreme Court hearing that was done in 2006 that was decided?
>
> A I don't think so. ... but I still didn't quite hear the name of the case.
>
> Q Zedner? It's referenced in the Toombs case.
>
> A With a Z?

Q Z.

A No, I'm not familiar with it.

Q Z-E-N-D-E-R. [sic]
Is it part of your responsibility under the Rules of Professional Conduct to be aware of law, particularly case law precedents, Supreme Court law, do you find that to be necessary to stay on top of what the law requires?

A I would say yes.

Q Okay.
So you're not familiar with the Zedner case in 2006?

A I said no.
– TRANSCRIPT - EVIDENTIARY HEARING at 13-14

Mr. Stuckey also testified that he never really paid any attention to the Speedy Trial Clock, choosing instead to rely on a decades-old understanding (erroneous though it was even then) coupled with the lack of activity from counsel representing other defendants in Mr. Smith's case. The following excerpt (from the Direct examination by Mr. Smith) of testimony is particularly telling:

Q Mr. Stuckey, one or two additional questions here is why didn't you confer with co-counsel

regarding the Speedy Trial Act? ...

A Because ... His Honor granted an "ends of justice" continuance in a fairly lengthy order. So it was my understanding, legal opinion, and knowledge that that took care of any Speedy Trial Act issue and that there wasn't one. I also knew that other competent counsel, the five or six in the case, would have jumped all over it if in fact there had been an issue. But the general answer to your question is it never was an issue in my mind.

Q And you never talked to Mr. O'Donnell about it at all as co-counsel.

A I can't quite remember all my conversations with Mr. O'Donnell, but I wouldn't have brought it up. He might have, but I would have told him there wasn't any issue, but I have no specific recollection of talking to him about the issue.

– TRANSCRIPT - EVIDENTIARY HEARING at 12-13

[underline added]

9. **The Practice of Speedy Trial Act Law in Courts of the Tenth Circuit**

A "complexity order" somehow waiving time forever may have been Mr. Stuckey's legal opinion, but as other attorneys who are actually competent and reasonably effective practitioners know, a "complexity"

order such as the one Mr. Stuckey was referring to [which can be found at USDC Docket Entry No. 95] is not effective for the purpose of tolling the speedy trial clock literally forever as was done in Mr. Smith's case. As previously noted, the trial court candidly admitted it's order was open-ended.

There are many well documented instances of attorneys in other cases actively defending their clients' rights to a speedy trial under the STA during the pendency of the proceedings against Mr. Smith. At least one case was heard in the US Supreme Court during this period. A small sampling of these cases [20] conclusively demonstrates that there were attorneys in the district who were fully aware of the Speedy Trial Act, and were in fact filing motions to dismiss. To wit:

- U.S. v. Apperson, 441 F.3d 1162 (10th Cir., 2006): defendant moved for dismissal, District court denied motion; appeals court upheld.

- U.S. v. Vogl, 374 F.3d 976 (10th Cir., 2004): defendant moved for dismissal, District court denied motion; appeals court upheld.

- United States v. Abdush-Shakur, 465 F.3d 458

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[20] These cases only involve alleged STA violation issues FILED OR RULED ON DURING THE PENDENCY of Mr. Smith's case, pre-trial. As is cited elsewhere in this Petition, there were relevant cases dating back as much as 20 years prior to Mr. Smith's case which were available to both attorneys for Mr. Smith.

(10th Cir., 2006): District court dismissed indictment on motion of defendant; appeals court upheld.

- U.S. v. Cano-Silva, 402 F.3d 1031 (10th Cir., 2005): District court dismissed indictment on motion of defendant; appeals court upheld.

- Zedner v. U.S., 126 S.Ct. 1976, 164 L.Ed.2d 749, 547 U.S. 489 (2006): defendant moved for dismissal, lower courts denied; USSC reversed.

- U.S. v. Batie, 433 F.3d 1287 (Fed. 10th Cir., 2006); defendant moved for dismissal, District court dismissed, appeals court reversed.

- U.S. v. Taylor, 454 F.3d 1075 (10th Cir., 2006); defendant moved for dismissal, District court denied, appeals court declined jurisdiction to hear appeal.

- U.S. v. Patterson, 472 F.3d 767 (10th Cir., 2006); defendant appealed and moved for dismissal for first time, on appeal. Appeals court dismissed for lack of jurisdiction.

- U.S. v. Stiger, 371 F.3d 732 (10th Cir., 2004); defendant moved to dismiss, District court denied motion; appeals court upheld.

- U.S. v. Hajduk, 370 F.Supp.2d 1103 (D. Colo., 2005); defendant moved to dismiss, court denied.

- U.S. v. Bailon-Cruz, 351 F.Supp.2d 1131 (D. Colo., 2004); defendant moved to dismiss, court granted.

- U.S. v. Perez-Alcatan, 376 F.Supp.2d 1253 (D.N.M., 2005); defendant moved to dismiss, court granted.

- U.S. v. Martinez, 376 F.Supp.2d 1168 (D.N.M., 2004); defendant moved to dismiss, court granted.

None of the foregoing cases are cited here for factual similarity to Mr. Smith's issues, rather they are relevant here as proof that many other attorneys in the District of Colorado knew of, and were professionally applying, the STA in defense of their clients, the opinion of the trial court notwithstanding.

10. **Appeals Court Misapplied the Law When Evaluating Mr. Smith's Petition for a COA**

Prior to the start of Mr. Smith's trial, the Tenth Circuit Court of Appeals had held many times and in many different circumstances, that various failings to comply with the strict requirements of the STA were grounds for dismissal of an indictment. Therefore the actual standard for granting a Certificate of Appeal as stated in the law, 28 U.S.C. § 2253, and at Lennox v. Evans, 87 F.3d 431 (C.A.10 (Okla.), 1996), should have been the standard by which Mr. Smith's request for a COA was evaluated. Certainly many reasonable jurists would disagree with the panel of the Tenth

Circuit which denied the COA application of Mr. Smith. See U.S. v. Palomba, 31 F.3d 1456 (C.A.9 (Cal.), 1994) for just one example of jurists disagreeing on this matter. It is unclear, however, exactly what the Tenth Circuit meant by this statement:

> * * * "Because jurists of reason could debate the correctness of the district court's decision, Smith is not entitled to a COA.
>
> We **DENY** Smith's request for a COA and **DISMISS** this matter."

App. at 7-8.

These two diametrically opposed conclusions are rather startling. The word "could" could be merely a typo and the word might have been meant to be "could not." However, it is nearly inconceivable that the learned Tenth Circuit would have actually concluded, in the face of their own voluminous rulings on the STA, that reasonable jurists could "not" have debated the correctness of the district court's decision. It therefore remains a mystery what the contradictory wording in the opinion really intended.

The opinion of the Tenth Circuit, considering the foregoing, seems rather contrived and strained.

FURTHERMORE, and with a dangerous disregard of possible consequences, the Tenth Circuit opinion in this matter that a level of zero competence by all of the approximately 19,000 attorneys in the Colorado District, if left to stand, will mean that no single

attorney can EVER fall below the average, and there will never be any ineffectiveness found. The Tenth Circuit failed to correct this new, unusual, and manifestly wrong opinion of the District court when they adopted its patently incorrect findings by quoting from the District court's Opinion (App. at 25). The Tenth Circuit gushed:

> "In a cogent, comprehensive and compelling decision, the district court concluded there was no evidence presented 'from which it could be concluded that any competent attorney, *a fortiori*, one who was aware of the Speedy Trial Act of 1974 and its requirements at the time and under the circumstances of this case[,] necessarily would have been required to file a motion to dismiss the indictment on that basis to come within the wide range of competence contemplated by Strickland.'" – App. at 4.

A. **Standard for Issuance of a COA**

The correct standard for issuance of a COA is found at 28 U.S.C. § 2253(c)(2) by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings.

B. **Standard is both law and is published**

The Tenth Circuit, as in other circuits, has a published standard for requesting and granting a

Certificate of Appealability. This published standard is the law, 28 U.S.C. §2253, not merely a nicety published by the Court of Appeals for convenience.

The Tenth Circuit's publishing of this can be found at their website at the link shown directly below:

http://forms.justia.com/official-federal-forms/circuit-court-of-appeals/10th-circuit-court-of-appeals/application-for-certificate-of-appealability-3787.html

The law as both codified and published IS THE ONLY standard applicable to this instant matter. Once a showing that a Constitutional issue is raised, such as the failure of counsel to meet the Strickland standard of performance, it simply requires that the issues raised are debatable among jurists, or that a court could resolve the issues differently, or that the questions deserve further proceedings. Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). As is shown herein, this standard was easily met in Mr. Smith's case.

C. **Manifest Error:**

The error of the trial court was significantly compounded by the Tenth Circuit Court adopting the USDC's ruling which held, in substance, that ALL attorneys practicing in the U.S. District court for the District of Colorado typically do not recognize or understand if and when a STA violation occurs. The

appeals court agreed with the trial court when it stated that in the District of Colorado there were no reasonably competent attorneys in the entire District of Colorado who could have recognized an STA violation in 2005-2007. Such an opinion effectively places ignorance as the lead trump card against ineffective assistance of counsel claims. This is not the standard which this Court has carefully and repeatedly articulated; i.e., Strickland.

D. The Court of Appeals Knew the STA was a Viable Defense

Even if based on Tenth Circuit cases alone, there were many attorneys in the district and within the jurisdiction of the Tenth Court of Appeals who did know, and who did file successful motions to dismiss indictments for STA violations. Further, there were many of these rulings which were made well prior to Mr. Smith's case and during it. Certainly, reasonable jurists could view the facts and disagree as to the correctness of the trial court's ruling.

Counsel has a duty to know and utilize applicable law (see Colorado Rules of Professional Conduct, supra). Incontrovertible facts and testimony show that these standards were not met, or even approached.

Based on relevant case law as cited above, and the plain statutory language, it was clear that before trial began on April 2, 2007 there had been a serious breach of the Speedy Trial Act. The trial court's failure to

make specific "ends-of-justice" findings regarding continuances, beyond the first one, resulted in those continuances not excluding any time.

The standard for issuance of a COA was not followed by the court of appeals.

11. **Summary of The Relevant Facts**

1) During the years of pendency of Mr. Smith's pre-trial time, this Court ruled in Zedner about the Speedy Trial Act, a ruling which Mr. Stuckey testified he was wholly unfamiliar with.

2) In the several years prior to indictment and during that period of time from Mr. Smith's indictment to the start of trial, courts in the Tenth Circuit (along with all other circuits) had numerous occasions to dismiss indictments for violations of the Speedy Trial Act – many of which were dismissed for violations very similar to those Mr. Smith alleged in his Section 2255 motion.

3) Many attorneys in the Tenth Circuit, including in the District of Colorado, were quite familiar with the strict requirements of the act, and what did and did not constitute grounds for a motion to dismiss – the opinion of the District court notwithstanding. This is plainly evidenced from the numerous motions to dismiss indictments or reverse rulings by a District court regarding STA violations, many upheld by the Tenth Circuit court itself.

4) There was a STA violation which neither of Mr. Smith's attorneys recognized due to general incompetence, and they failed in their duty to their client by not filing a motion to dismiss the indictment as it related to Mr. Smith.

5) The District court concocted a hitherto unknown "standard" to evaluate the reasonableness of Mr. Stuckey's and Mr. O'Donnell's lack of action which was based on the idea that if everyone is equally under-informed, then no individual attorney can be found to be below that level. The Tenth Circuit managed to swallow this rationale and deny Mr. Smith's COA, contrary to its own standard and prevailing law.

6) Finally, the trial court's opinion regarding the lack of competency of approximately 19,000 District of Colorado attorneys is, even if it were to become a "standard" by which all other IAC cases could be resolved, is simply not true or accurate. As shown herein there were many motions or appeals filed in the Tenth Circuit alone which relied on an attorney's legal opinion of a possible STA violation. Mr. Stuckey's professional incompetence and Mr. O'Donnell's confessed ignorance being no worse " ... than all other [attorneys] understanding or practice of competent criminal defense attorneys in this district"[21] is not, as the court would have us believe, an excuse founded in fact.

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[21] App. at 17.

Ignorance of the law is generally held to be NO EXCUSE for failing to abide by the law when we are referring to the ordinary Citizen. Ignorance of the law by attorneys who needed to know it to protect the rights of their client is a much more stringent requirement – Mr. Stuckey and Mr. O'Donnell failed in their duty.

CONCLUSION

This Petition is an Appropriate Vehicle for an Exercise of the Court's Summary Disposition Powers.

Very Respectfully prepared and submitted this 7th day of March, 2011 by:

/s/ Michael D. Smith
Michael Duane Smith, 27466-013
Pro Se
Federal Prison Camp
Littleton, Colorado 80123

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of
Appeals Tenth Circuit
October 15, 2010
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

MICHAEL D. SMITH,

Defendant - Appellant.

No. 10-1240
(D.C. No. 1:08-CV-01438-REB and 1:04-CR-00103-REB-06)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY AND DISMISSING APPEAL

Before **BRISCOE,** Chief Circuit Judge, **TACHA,** and **O'BRIEN,** Circuit Judges.

Michael D. Smith[1] seeks leave to appeal from the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside or correct sentence. In it he claimed his attorneys were ineffective in failing to appreciate and properly respond to what he views as a Speedy Trial Act violation. 18 U.S.C. §§ 3161-3174.

On March 10, 2004, an indictment was returned against Smith and six others charging them with multiple counts of conspiracy and securities fraud. Smith made his initial appearance on March 12, 2004,[2] and posted bond on March 31, 2004 (his release on bond continued until his voluntarily surrender to the Bureau of Prisons on July 28, 2008). He was arraigned April 12, 2004, and pled not guilty.[3] A joint jury trial[4] began April 2, 2007, and concluded on May 29, 2007. The jury found Smith guilty on three of the seventeen counts alleged against him.

At first blush it might appear a speedy trial

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[1] The district court granted Smith lea to appeal in forma pauperis *(ifp)*. This Court appointed counsel under the Criminal Justice Act (18 U.S.C.A. § 3006A).

[2] Smith's brief sets his initial appearance on that date; we accept his assertion.

[3] On October 25, 2005, Smith was re-arraigned pursuant to a second superseding indictment. He entered a plea of not guilty. The last co-defendant was arraigned on April 26, 2004.

[4] Smith and three co-defendants were tried together.

problem may have been overlooked by counsel, but closer review proves otherwise. Because Smith has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), we deny his request for a certificate of appealability (COA).

I. BACKGROUND

Smith was convicted by a jury of three counts of securities fraud in violation of 15 U.S.C. §§ 77q(a), 77x, and 18 U.S.C. § 2 and was sentenced to 60 months imprisonment. He filed a direct appeal and the government cross-appealed. However, the parties filed a joint motion to dismiss the appeals, which this Court granted. *See United States v. Smith*, Nos. 08-1246 & 08-1282 (10th Cir. July 16, 2009) (unpublished).

Following dismissal of the appeals, Smith filed this § 2255 motion.[5] It was supported by an affidavit of one of his two trial counsel, Declan O'Donnell, essentially confessing his alleged ineffectiveness with respect to speedy trial issues.

The district court held an evidentiary hearing

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[5] Smith also filed several previous § 2255 motions claiming ineffective assistance of counsel, the first before he was sentenced and the others during the pendency of his direct appeal. The district court dismissed all three as premature and denied a COA. We denied Smith's request for a COA. *See United States v. Smith*, No. 09-1066 (May 13, 2009) (unpublished).

wherein testimony was elicited from both of Smith's trial counsel, O'Donnell, whose role in the trial was minor (or at least secondary) and Richard Stuckey, who was the primary trial attorney. In a cogent, comprehensive and compelling decision, the district court concluded there was no evidence presented "from which it could be concluded that any competent attorney, *a fortiori*, one who was aware of the Speedy Trial Act of 1974 and its requirements at the time and under the circumstances of this case[,] necessarily would have been required to file a motion to dismiss the indictment on that basis to come within the wide range of competence contemplated by *Strickland*." R. Vol. II at 180-81.) In arriving at this conclusion, the court found O'Donnell's testimony "to be entirely incredible and unworthy of credence," and described his role during the pretrial and trial stages as "marginal." (*Id* at 178.) On the other hand, the court found Stuckey's testimony "credible." (*Id* at 174.) His testimony "demonstrate[d] that the prevailing view of competent attorneys at the time was that the combined effect of [the district court's] April 30, 200[4], ends-of-justice order and the numerous pending pretrial motions effectively obviated any speedy trial concerns." (*Id* at 180.)

The district court candidly admitted an apparent

deficiency in its April 30, 2004 ends-of-justice order[6] in light of subsequent pronouncements by this Court in *United States v. Toombs*, 574 F.3d 1262 (10th Cir. 2009), and *United States v. Williams*, 511 F.3d 1044 (10th Cir. 2007). Analyzing our holdings in *Toombs* and *Williams*, the district court conceded its "open-ended [ends-of-justice order] ... was not sufficient *per se* to have warranted a nearly three-year continuance of the trial and that the significant lapse of time between the filing and resolution of many of the numerous motions submitted in this case was not entirely excludable either." R. Vol. II at 173.) Even though the ends-of-justice order might not now comply with our pronouncements, the judge correctly explained why such an issue did not render Smith's trial counsel ineffective. See *Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."); *see also Dever v. Kan. State Penitentiary*, 36 F. 3d 1531, 1537 (10th Cir. 1994)

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[6] On April 30, 2004, over Smith's objection, the court granted a co-defendant's motion for declaration of complexity, concluding the case was complex and "the ends of justice served by granting the motion outweigh the best interests of the public and the defendants in a speedy trial within the meaning of 18 U.S.C. § 3161(h)(8)(A)." R. Vol. II at 78.) Over the course of approximately three years this "ends-of-justice order" proved to be prescient – the case was not only complex, but contentious.

(same). In particular, he said:

> While recognition of this understanding of the state of the law would not necessarily excuse a Speedy Trial Act violation in the first instance, it does pertain directly to the question whether counsel was ineffective for failing to perceive and advance the issue. For had Mr. O'Donnell appreciated the potential speedy trial issue, he would have been far more perspicacious than either this court or the approximately 15 other experienced criminal defense lawyers who were involved at one time or another in this case, including Mr. O'Donnell's own co-counsel. (R. Vol. II at 174-75.)

Accordingly, the court concluded Smith did not meet the first prong of the two part test set forth in *Strickland,* 466 U.S. at 687 (plaintiff must show his attorney's performance (1) fell below an objective standard of reasonableness and (2) that the unreasonably deficient performance resulted in prejudice).[7] It also denied Smith's request for a COA.

II. DISCUSSION

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[7] The district court also noted Smith had "utterly failed to address the prejudice prong of *Strickland*." (R. Vol. II at 181.)

A COA is a jurisdictional prerequisite to our review of a petition for a writ of habeas corpus. *Miller-El y. Cockrell,* 537 U.S. 322, 336 (2003). We will issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, an applicant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quotations omitted). In evaluating whether an applicant has satisfied this burden, we undertake "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each of his claims. *Miller-El,* 537 U.S. at 338.

We have undertaken a thorough review of Smith's appellate brief in support of his request for a COA, the district court's detailed order denying Smith's § 2255 motion, the record, and the applicable law. Regardless of O'Donnell's post hoc admissions, primary trial counsel's failure to move for a Speedy Trial Act dismissal did not fall below objectively reasonable standards of attorney performance considering the circumstances of this case and the then extant law. Counsel is required to be careful and competent, but not prescient. Because jurists of reason could debate the correctness of the district court's decision, Smith is

not entitled to a COA.

We **DENY** Smith's request for a COA and **DISMISS** this matter.

Entered by the Court:

/s/ Terrence L. O'Brien
Terrence L. O'Brien
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Criminal Action No. 04-cr-00103-REB-06
(Civil Action No. 08-cv-01438-REB)

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL D. SMITH,
Defendant.

ORDER DENYING MICHAEL D. SMITH'S VERIFIED 28 U.S.C. § 2255 HABEAS PETITION TO VACATE JUDGMENT OF CONVICTION AND SET ASIDE SENTENCE

Blackburn, J.

The matter before me is **Michael D. Smith's Verified 28 U.S.C. § 2255 Habeas Petition To Vacate Judgment of Conviction and Set Aside Sentence** [#1771][1], filed July 22, 2009. I heard the motion on January 21, 2010. I deny the motion.

[1] "[#1771]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's electronic case filing and management system (CM/ECF). I use this convention throughout this order.

I. JURISDICTION

I have jurisdiction over this case pursuant to 28 U.S.C. § 2255(a) ("A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.")

II. STANDARD OF REVIEW

Section 2255 of Title 28 of the United States Code provides a remedy in the nature of habeas corpus to a prisoner sentenced by a federal court who seeks to vacate, set aside, or correct his sentence.[2] See **Barkan**

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[2] A proceeding under 28 U.S.C. § 2255 is "a further step in the movant's criminal case and not a separate civil action." ***United States v. Frady***, 456 U.S. 152, 182 n.6, 102 S.Ct. 1584, 1602 n.6, 71 L.Ed.2d 816 (1982). Although the proceeding inherently is criminal in nature, the Administrative Office of the United States Courts requires, for statistical purposes only, that a nominal civil action be opened when a petition under section 2255 is filed. ***See United States v. Cook***, 997 F.2d 1312, 1315 (10th Cir. 1993) ("[T]his practice appears to be the result of instructions from the Administrative Office of the United States Courts. The instructions contemplate assigning a civil number in order to provide continuity with previous recording of Section

v. United States, 341 F.2d 95, 96 (10th Cir.) ("The remedy provided for in Section 2255 is as broad as habeas corpus, and its purpose was to afford the same rights as in habeas corpus, but with jurisdiction confined to the sentencing court. The remedy supplants that of habeas corpus."), **cert. denied,** 85 S.Ct. 1773 (1965).

Defendant bears the burden of demonstrating that he is entitled to relief under the statute. ***Hatch v. State of Oklahoma***, 58 F.3d 1447, 1457 (10th Cir. 1995), ***cert. denied***, 116 S.Ct. 1881 (1996). Because defendant is essentially proceeding *pro se*, I have reviewed his motion more liberally than pleadings or papers filed by attorneys. ***See, e.g., Erickson v. Pardus***, 551 U.S. 89, 94, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007); ***Haines v. Kerner,*** 404 U.S. 519, 520-21, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972); ***Andrews v. Heaton***, 483 F.3d 1070, 1076 (10th Cir. 2007); ***Hall v. Bellmon***, 935 F.2d 1106, 1110 (10th Cir. 1991).

III. ANALYSIS

Following twenty-six days of trial and seven days of deliberations, a jury returned a verdict finding defendant guilty of three counts of securities fraud and not guilty of the remaining fourteen counts with which

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2255 motions to vacate sentences and to study the impact of such motions on civil filings and dispositions.") (internal citations and quotation marks omitted).

he was charged. (***See* Courtroom Minutes – Jury Trial – Day Thirty-Three** at 20-23 [#1222], filed May 29, 2007.) He was sentenced to a total term of imprisonment of 60 months. (***See* Judgment in a Criminal Case** at 3 [#1643], entered July 7, 2008.) After repeated, premature attempts, defendant filed the instant pro se motion seeking to vacate his sentence and dismiss the charges against him for alleged ineffective assistance of counsel. Specifically, defendant maintains that only one of his two co-counsel, Declan J. O'Donnell, was ineffective for failing to move for dismissal of the indictment on speedy trial grounds. Mr. O'Donnell proffered an affidavit in support of defendant's claims in which he, figuratively speaking, fell on his sword, averring that, as a result of his ignorance of the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174, he failed to file a motion to dismiss the indictment for violation of defendant's right to a speedy trial.

Pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts, I convened an evidentiary hearing on January 21, 2010, to consider defendant's motion. Defendant represented himself at the hearing, although advisory counsel was present and available to assist him. (***See* Order for Appointment of Advisory Counsel** [#1796], entered December 1, 2009.) Both Mr. O'Donnell and Richard N. Stuckey, who also represented defendant during pretrial and trial proceedings, were called to testify. The government presented no witnesses. Having considered all relevant evidence, including the

testimony and documentary evidence, as well as the arguments presented and authorities cited by both defendant and the government in their respective briefs, I find and conclude that defendant's motion must be denied.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." To effectuate that constitutional right, counsel must be provided to assist an indigent defendant. ***See Gideon v. Wainwright***, 372 U.S. 335, 342-45, 83 S.Ct. 792, 795-97, 9 L.Ed.2d 799 (1963); ***Baker v. Kaiser***, 929 F.2d 1495, 1498 (10th Cir. 1991). The right to counsel extends beyond the right simply to have an attorney present and implies the right to effective counsel. ***McMann v. Richardson***, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n.14, 25 L.Ed.2d 763 (1970); ***McGee v. Crist***, 739 F.2d 505, 506 (10th Cir. 1984). Counsel is considered effective if he "exercise[s] the skill, judgment and diligence of a reasonably competent defense attorney." ***Dyer v. Crisp***, 613 F.2d 275, 278 (10th Cir.) (en banc), ***cert. denied***, 100 S.Ct. 1342 (1980).

To prove that he received ineffective assistance of counsel, defendant must make two discrete showings:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

> "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Defendant, who bears the burden of proof, must overcome a strong presumption that counsel was effective. ***Id.***, 104 S.Ct. at 2065. ***See also United States v. Cronic***, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984); ***United States v. Rantz***, 862 F.2d 808, 810 (10th Cir. 1988), ***cert. denied***, 109 S.Ct. 1554 (1989).

Under the first prong of ***Strickland***, defendant must establish that his counsel's performance fell below an objective standard of reasonableness. ***Strickland***, 104 S.Ct. at 2064. This standard is highly deferential and recognizes a wide range of professional competence. ***Id.*** at 2064-65. The court must eschew the benefit of hindsight and judge counsel's decisions in light of the facts of the particular case at the time of counsel's representation. ***Id.*** at 2065-66. Moreover, "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." ***Id.*** at 2065.

Defendant expends much effort in attempting to prove that a violation of the Speedy Trial Act, in fact, occurred in this case. While I find his assumptions misguided, his calculations artificial, and his argument unpersuasive, and do not necessarily concede that defendant's speedy trial rights were violated under his, or any other, scenario,[3] neither do I find it necessary to engage in a reticulated concatenation of the excludable time attendant to any particular motion in this case, because defendant's argument misses the mark. Regardless of whether a violation occurred *vel non*, the more salient questions are, first, whether a reasonably competent attorney

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[3] I note also that this was not a case that was left simply to languish on the court's docket. From the time the original indictment was returned, scarcely a week went by in which there was not some substantive activity on the docket. Although my order granting the ends-of-justice continuance did not expressly quantify the number of days to be excluded from the calculation of the speedy trial time or specify a date certain for the trial, the case, in fact, was reset for trial relatively soon thereafter. (***See* First Trial Preparation Conference Order** [#155], filed August 26, 2004 (resetting the trial for September 6, 2005).) I held status conferences to assess the readiness of the case for trial on August 3, 2005 [#505], October 25, 2005 [#576], February 3, 2006 [#654], and April 21, 2006 [#728]. At each of those conferences, pretrial motion deadlines and an appropriate date for the trial were reevaluated based on input from all parties. The delay between the August 23, 2005, order vacating the September 2005, trial date and the April 21, 2006, order setting the trial for its ultimate commencement on April 2, 2007, was due not to a lack of diligence on the part of any party or the court, but rather to the need to parse the various pretrial motions and proffers vital to an informed and rational resolution of the issues inherent to the case.

under the circumstances of the case at the time would have recognized such a violation and, second, whether effective assistance of counsel necessarily would have required him to file a motion to dismiss the indictment on that basis. Defendant has failed to sustain his burden as to either of these necessary factual predicates.

Undoubtedly, with the benefit of the Tenth Circuit's post-trial pronouncements in ***United States v. Toombs***, 574 F.3d 1262 (10th Cir. 2009), and ***United States v. Williams***, 511 F.3d 1044 (10th Cir. 2007),[4] it appears likely that my open-ended **Order Granting Defendant's Motion for Declaration of Complexity** [#95], filed April 30, 2004, was not sufficient *per se* to have warranted a nearly three-year continuance of the trial and that the significant lapse of time between the filing and resolution of many of the numerous motions submitted in this case was not entirely excludable either.[5]

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[4] Although defendant repeatedly invokes the Supreme Court's decision in ***Zedner v. United States***, 547 U.S. 489, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006), rendered prior to trial, that case stands for the proposition that a defendant may not prospectively waive his speedy trial rights, an issue not implicated in this case.

[5] I further note that although the motion requested a declaration of complexity, such a finding is only one factor that must be considered in determining whether the ends of justice would be served by granting a continuance of the trial. 18 U.S.C. § 3161(h)(7)(B)(ii). It is clear that I granted the motion based on a finding that the ends of justice would be served by a

Nevertheless, and although ***Williams*** and ***Toombs*** did not purport to radically change the law of speedy trial, they did clarify with new precision the demands of the Speedy Trial Act in a way that had not been entirely manifest previously. For example, it certainly was not this court's understanding of the apposite law that compliance with the Speedy Trial Act demanded the level of detail found essential under ***Toombs***. ***See Toombs***, 574 F.3d at 1278-79 (Tymkovich, J., dissenting) (finding that district court's findings were adequate under existing Tenth Circuit precedents). More to the point, the evidence presented at the hearing affirms that such was not the understanding or practice of competent criminal defense attorneys in this district, either. Mr. Stuckey, one of the defendant's co-counsel who has practiced criminal defense law in this district since 1968 and who was an eminently credible witness, testified that in his opinion, the complexity of the case, the entry of the ends-of-justice order, and the pendency of numerous substantive pretrial motions together effectively negated any speedy trial issue in this matter. He further testified, again credibly, that the failure of any of the other experienced defense counsel involved in the case to assert a speedy trial issue confirmed and corroborated his opinion in that regard.

While recognition of this understanding of the

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continuation of the trial date past the Speedy Trial Act deadline. (***See* Order Granting Defendant's Motion for Declaration of Complexity** ¶ 6 at 5 [#95], entered April 30, 2004.)

state of the law would not necessarily excuse a Speedy Trial Act violation in the first instance, it does pertain directly to the question whether counsel was ineffective for failing to perceive and advance the issue. For had Mr. O'Donnell appreciated the potential speedy trial issue, he would have been far more perspicacious than either this court or the approximately 15 other experienced criminal defense lawyers who were involved at one time or another in this case, including Mr. O'Donnell's own co-counsel. "[A] defendant is not entitled to representation by a modern-day Clarence Darrow – mere competence will suffice." ***Oyague v. Artuz***, 393 F.3d 99, 107 (2nd Cir. 2004) (citation and internal quotation marks omitted); ***see also Bosch v. McKune***, 2006 WL 1007257 at *5 (D.Kan. April 17, 2006) ("The standard under ***Strickland*** requires that a defendant receives competent, not cutting edge, [] counsel."). The fact that neither defendant's seasoned co-counsel nor any of the other able attorneys or, indeed, this court, perceived a speedy trial issue strongly suggests that the lapse, if such there was, was not outside the boundaries of competence at the time the case was tried.

Moreover, defendant has presented nothing indicating that a reasonably competent attorney necessarily would have found it advisable to bring a motion to dismiss on speedy trial grounds even had he perceived such a violation. To be effective, an attorney need not bring forward every conceivable motion that might be filed. ***See Jones v. Barnes***, 463 U.S. 745, 751-54, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987

(1983); ***see also United States v. Harms***, 371 F.3d 1208, 1212 (10th Cir. ("[C]ounsel's failure to raise or recognize a potential legal argument does not automatically render counsel's performance constitutionally deficient."). Mr. Stuckey testified that the determination not to invoke the Speedy Trial Act in defendant's case was not a trial tactic on his part, likely because he did not believe there to be a violation in the first instance. However, he did acknowledge that it was a common strategy at the relevant time (as undoubtedly it remains today) for a criminal defense attorney to delay commencement of the trial when the client was at liberty while awaiting trial, as was defendant here, and there was a reasonable probability of conviction, which given the overwhelming nature of the evidence against defendants in this case, also pertained here.[6] Indeed, in a case such as this one, delay could well have been thought to constitute a strategic and tactical advantage even in the face of a potential speedy trial issue. As the witness testimony in the trial of this case repeatedly demonstrated, memories rarely improve with the passage of time, a fact that has been noted by no less an authority than the United States Supreme Court:

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[6] I note, for example, that defendant was able to travel to a church-sponsored "men's retreat" in Idaho (***see*** **Motion To Modify Bond By Allowing Travel to Idaho** [# 985], filed January 31, 2007), and to possess a bow and arrow so he could bow hunt during the month of September, 2006 (***see*** **Motion To Modify Bond Condition** [#829], filed August 31, 2006), liberties and opportunities obviously not afforded his incarcerated co-defendants.

> [D]eprivation of the right [to a speedy trial] may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. It the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

Barker v. Wingo, 407 U.S. 514, 521, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101 (1972). Nor is it radical to think that prosecutorial zeal for a case tends to dwindle in direct proportion to the ever increasing temporal distance between the indictment and the trial. Such practical considerations are, indeed, relevant in considering what a reasonably competent attorney would have done under the circumstances.

In addition, I note that regardless of Mr. O'Donnell's competence, *vel non*, he was but one of two co-counsel for defendant. At the very least, I must consider the effectiveness of his trial team as a unit, rather than focusing on the alleged deficiencies of the admittedly weaker member. ***See, e.g.***, ***Bucklew v. Luebbers***, 436 F.3d 1010, 1019 (8th Cir.), ***cert. denied***, 127 S.Ct. 725 (2006); ***Bowling v. Parker***, 344 F.3d 487, 509 (6th Cir. 2003), ***cert. denied***, 125 S.Ct. 281

(2004); ***McDouglass v. Dixon***, 921 F.2d 518, 535, 539 (4th Cir. 1990), ***cert. denied***, 111 S.Ct. 2840 (1991); ***United States v. Diesel***, 2009 WL 790232 at *3 (D. Kan. Mar. 24, 2009), ***appeal dism'd***, 341 Fed. Appx. 457 (10th Cir. Aug. 18, 2009). Mr. Stuckey testified to his solid, long-standing credentials as a criminal attorney, and he is known personally to this court to be a competent and capable defense lawyer in complex criminal cases such as this one. As noted above, he testified credibly that he perceived no speedy trial issue in this case based on his reasoned and reasonable assessment of the facts of the case and the law as it was generally understood and applied at the time. Moreover, and most relevantly, defendant has never argued that Mr. Stuckey provided him ineffective assistance of counsel.

More importantly in this regard, Mr. Stuckey testified that, although Mr. O'Donnell remained a counsel of record for defendant after Mr. Stuckey entered his appearance on defendant's behalf on July 14, 2006, it was Mr. Stuckey who assumed primary responsibility for the defense and that Mr. O'Donnell became second chair thereafter.[7] Indeed, on the witness stand, Mr. O'Donnell retracted his affidavit testimony to the effect that he, O'Donnell, was "responsible for all pretrial motions" and that Mr. Stuckey had no input in such matters. (***See***

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[7] Indeed, Mr. O'Donnell expressly assumed the second chair at trial due to numerous alleged medical issues. (***See*** **Memorandum Re: Medical Complications re Declan J. O'Donnell** [#1095], filed March 30, 2007.)

Supplement, Exh. A ¶ 8 at 2 [#1772], filed July 29, 2010.) This testimony squares with my own recollection of the relative primacy of position between Mr. Stuckey and Mr. O'Donnell in pretrial and trial proceedings, as well as the docket in this case, which circumstantiates that Mr. Stuckey filed the majority of the substantive motions and was responsible for the majority of the jury instructions submitted on defendant's behalf. The docket confirms my own recollection that Mr. O'Donnell was responsible in the main for advancing a few, pet arguments[8] and for attempting to defend his inadequate and untimely attempt to designate expert witnesses. (***See*** **Defendant Smith's Statement as to Expert Witness for Trial** [#892], filed November 3, 2006; **Reply to Objections re Defendant Michael Smith's Expert Witness** [#977], filed January 22, 2007.) In other words, Mr. O'Donnell's role in the pretrial development and trial of this matter can best be described as marginal. Thus, I give no credence to the notion that his asserted lack of knowledge of the

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[8] Namely, defendant's claim of outrageous government conduct (**Defendant Michael Smith's Reply to Government Response (Doc. 902) to Smith Proffer (Doc. 883)** [#908], filed November 19, 2006); **Proffer of Defendant Michael Smith** [#883], filed October 28, 2006), and his attempt to submit a jury instruction in support of a good faith defense (**Defendant Michael Smith's Proposed Supplement Non-Stipulated Instruction Regarding Due Diligence Standards** [#1114], filed April 11, 2007; **Defendant Michael Smith's Second Proposed Supplement Non-Stipulated Instructions Regarding Due Diligence Standards** [#1130], filed April 18, 2007).

Speedy Trial Act played any role whatsoever in the decision not to file a motion to dismiss on that basis.

Indeed, overall I find Mr. O'Donnell's testimony in this matter to be entirely incredible and unworthy of credence. Mr. O'Donnell's demeanor on the witness stand during the January 21, 2010, hearing can be described, generously, as vague. Despite the alleged centrality of his role in these proceedings, he had a surprisingly meager recollection of any of the particulars of this case. In particular, although asserting that he reviewed the record of the case at the time he entered his appearance on defendant's behalf, Mr. O'Donnell claimed incredibly never to have seen my April 30, 2004, order granting an ends of justice continuance under the Speedy Trial Act. He also feigned total ignorance of the Act despite having joined in a motion to continue the September 6, 2005, trial date on that basis (***see* Motion To Continue Trial Date** ¶ 1 at 1 [#463], filed June 20, 2005), and being present at the August 3, 2005, hearing on that motion, in which I specifically referenced the Speedy Trial Act of 1974 in granting an ends-of-justice continuance of the trial date (Gov't Hrg. Exh. 5 at 9). To accuse O'Donnell of dissembling would be polite.

O'Donnell's testimony is riddled also with irreconcilable inconsistencies. His acknowledgment from the stand, contrary to his affidavit testimony, that he, in fact, was not solely responsible for all pretrial motions to the exclusion of Mr. Stuckey is but one example. Others include his suggestion that the very existence of the Speedy Trial Act was unknown to

him, despite his simultaneous acknowledgment that Mr. Stuckey informed him in the 1980s, during Mr. O'Donnell's own lengthy criminal trial, that "speedy trial does not apply in complex cases." (**Affidavit of Declan Joseph O'Donnell as Counsel for Defendant Michael Smith** ¶ 10 at 2 [#1772], filed July 29, 2009.) Mr. O'Donnell's hearing testimony was little more coherent. First averring that, had he been aware of the Speedy Trial Act, he would have filed a motion to dismiss the indictment, Mr. O'Donnell subsequently testified that he was "neutral" on the question whether defendant's speedy trial rights had been violated, *vel non*. Indeed, it is difficult to credit that Mr. O'Donnell would have filed such a motion, since it appears that he made no effort to determine for himself whether such a violation may have occurred, apparently accepting at face value the assessment to that effect of an unidentified paralegal who assisted defendant with otherwise unspecified, post-sentencing matters.[9] Nevertheless, the fact that Mr. O'Donnell himself may have been unaware of defendant's federal statutory speedy trial rights is neither here nor there. Although I do not find the notion that Mr. O'Donnell was ill-versed in the relevant law incredible, his admitted lack of legal acumen ultimately is irrelevant. Assuming *arguendo* that the decision to file a motion to dismiss the

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[9] Mr. O'Donnell also appears to have accepted at face value this individual's soi-disant and selfproclaimed expertise in speedy trial matters, despite the fact that he had never met, let alone heard of, him before the paralegal contacted O'Donnell about defendant's case.

indictment on speedy trial grounds was Mr. O'Donnell's to make, an assumption for which the record provides no support whatsoever, there is no evidence from which it can be concluded that his failure to do so was deficient "under prevailing professional norms." ***Strickland***, 104 S.Ct. at 2065. As set forth more fully above, Mr. Stuckey's credible testimony demonstrates that the prevailing view of competent attorneys at the time was that the combined effect of my April 30, 2005, ends-of-justice order and the numerous pending pretrial motions effectively obviated any speedy trial concerns. There is simply no evidence before me from which it could be concluded that any competent attorney, *a fortiori*, one who was aware of the Speedy Trial Act of 1974 and its requirements at the time and under the circumstances of this case necessarily would have been required to file a motion to dismiss the indictment on that basis to come within the wide range of competence contemplated by ***Strickland***. Defendant's petition may be denied on that basis alone. ***Cooks v. Ward***, 165 F.3d 1283, 1292-92 (10th Cir. 1998) (court "need not address both [prongs of ***Strickland***] if [defendant] fails to make a sufficient showing of one"), ***cert. denied***, 120 S.Ct. 94 (1999).[10]

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[10] I note that defendant has utterly failed to address the prejudice prong of ***Strickland***. Perhaps he is under the impression that the failure to file a motion to dismiss on speedy trial grounds would inexorably have led to dismissal of the charges against him, thus automatically establishing prejudice. Such an assumption is fraught with peril, however, as it relies on the further dubious assumptions that such a motion would have

IV. CONCLUSION

Defendant has failed to sustain his burden of proof to demonstrate that his counsel's performance fell below an objective standard of reasonableness and was, therefore, constitutionally deficient within the meaning of ***Strickland***. Accordingly, his claim of ineffective assistance of counsel fails, and his motion to vacate and set aside his sentence must be denied.

V. ORDERS

THEREFORE, IT IS ORDERED as follows:

1. That **Michael D. Smith's Verified 28 U.S.C. § 2255 Habeas Petition To Vacate Judgment of Conviction and Set Aside Sentence** [#1771], filed July 22, 2009, is **DENIED**; and

2. That under 28 U.S.C. § 2253(c)(2) and Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts, a certificate of appealability is

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been granted by the court and either that the indictment would have been dismissed with prejudice or, if dismissed without prejudice, that the government would not have simply reindicted defendant post-haste. However, because resolution of these issues is not required given defendant's failure to establish a violation under the first prong of ***Strickland***, I decline to further delve into the murky, hypothetical waters that consideration of these issues inevitably would entail.

DENIED.

Dated May 26, 2010, at Denver, Colorado.

BY THE COURT:

/s/ Robert E Blackburn
Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 04-cr-103-REB

UNITED STATES OF AMERICA, Plaintiff,

v.

MICHAEL SMITH (6), Defendant.

AFFIDAVIT OF DECLAN JOSEPH O'DONNELL AS COUNSEL FOR DEFENDANT MICHAEL SMITH

Undersigned Counsel, being of lawful age and first duly sworn, declares and says as follows:

1. On February 24, 2005, Mr. O'Donnell entered this case as lead counsel for Defendant Michael Smith (hereinafter "Mr. Smith") after Attorney Robert Sticht had withdrawn as Mr. Smith's counsel.

2. On July 7, 2006, Attorney Richard Stuckey joined Mr. O'Donnell as co-counsel and Mr. O'Donnell remained as lead counsel until trial commenced. Because of injuries Mr. O'Donnell sustained of a disabling nature, Mr. Stuckey became lead counsel once trial began.

3. On November 19, 2007, Mr. O'Donnell withdrew

as lead counsel on his own motion in order to clarify that Mr. Stuckey would be Mr. Smith's counsel at sentencing [1428].

4. On May 16, 2008, Mr. O'Donnell consulted with affiliated counsel Robert Alan Jones concerning the recent dismissal of another "Aegis" related case, i.e. U.S. v. Wilson et al., Case No. 1:05-CR-45 in the United States District Court for the Southern District of Ohio, Western Division, Judge Sandra S. Beckwith presiding.

5. Mr. O'Donnell learned that Judge Beckwith dismissed the indictment because more than 70 non-excludable days had elapsed before trial was to begin violating the Speedy Trial Act. This is when Mr. O'Donnell learned of the Speedy Trial Act and a defendant's rights under the Speedy Trial Clause of the Sixth Amendment.

6. Immediately thereafter, Mr. O'Donnell examined Mr. Smith's docket and tested it against the time requirements in the Speedy Trial Act to determine, in particular, whether the 70day trial time clock had been violated. Mr. O'Donnell discovered that Mr. Smith had not been brought to trial within the required 70 non-excludable days and had been entitled to an order of dismissal had Mr. O'Donnell filed a motion to dismiss.

7. While lead counsel, Mr. O'Donnell was wholly

unfamiliar with the time provisions of the federal Speedy Trial Act and that dismissal of Mr. Smith's indictment was mandated by statute had he timely filed a pre-trial motion to dismiss. Because most of Mr. O'Donnell's practice has been in state court, he was only familiar with Colorado's speedy trial statute.

8. When Mr. Stuckey joined as co-counsel, he became fully immersed in discovery problems, computer disks, while also trying to learn the facts of the case. Since Mr. O'Donnell was responsible for all pretrial motions, Mr. Stuckey's responsibilities did not include monitoring the speedy trial clock.

9. As it relates to the Speedy Trial Act and its remedy of dismissal for a violation upon a pretrial motion, Mr. O'Donnell admits that he was ineffective as Mr. Smith's counsel because Mr. O'Donnell should have known of the violation and should have timely moved to dismiss the indictment.

10. Furthermore, Mr. Stuckey was Mr. O'Donnell's attorney during the 1980s and during his trial before Judge Matsch on tax shelter issues. Mr. Stuckey's limited experience then and now is based on the simple mantra, however erroneous, that "speedy trial does not apply in complex cases."

11. Mr. O'Donnell graduated from the University of

Notre Dame in 1960, holding a Bachelor of Business Administration, BBA, with a minor in philosophy. He entered law school that year at the University of Michigan Law School. His courses in criminal law were held during the years 1960-1962. He remembers speedy trial in federal court as a constitutional issue only: there was no Speedy Trial Act, (because it came in 1974).

12. Mr. O'Donnell passed the Michigan and Colorado Bar exams in 1965. On the Colorado Bar his highest scores were in procedure and constitutional law. However, there was no federal Speedy Trial Act in existence so only constitutional standards were effective then.

13. Mr. O'Donnell has no memory of any Continuing Legal Education classes announced for "speedy trial," neither federal nor state. He knows that he was never formally exposed to it in any classes that he took in CLE, or otherwise.

14. His own trial before Judge Matsch took over 10 years from 1981 indictment to judgment of 1991 not guilty. It was a complex case and Mr. Stuckey often repeated his mantra to the effect "that there was no speedy trial applicable in complex cases."

15. During his career as an attorney, federal speedy trial had never become an issue. While employed as staff assistant to Governor John A.

Love from 1964-1967 he worked on legislation and Colorado Department of Corrections issues as part of his duties. Speedy trial was relevant in pardon application cases, but no federal speedy trial issues existed, (and that was usually the province of the Attorney General's Office). When employed as an associate attorney of Costello and Kofoed, P.C. he only handled Colorado state court cases. As a sole proprietorship and briefly as a partner in O'Donnell, Shieman, Sanders, and Reynolds, P.C. Federal speedy trial issues never occurred.

16. During the defense of Mr. Smith in the subject case, Mr. O'Donnell was unprepared and ineffective on the issue of federal speedy trial because neither his education nor his work experience focused on it.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Declan Joseph O'Donnell
Declan Joseph O'Donnell
777 Fifth Ave.
Castle Rock, CO 80105

NOTARY

Before me this 9th day of July , 2008, appeared Declan Joseph O'Donnell, J.D. who acknowledged his signature and certifies the truthfulness to the best of his ability to the foregoing Affidavit.

[The original is properly executed by the Notary]

/s/ Rene Gorman
Notary Public
State of Colorado